Supreme Court, U.S.
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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BOARD OF EDUCATION OF PLAINVIEW-OLD BETHPAGE CENTRAL SCHOOL DISTRICT and EDWARD METZENDORF,

Petitioners,

vs.

LINDA DONATO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a school district, by complying with New York State Education Law Section 3031, requiring the district to furnish a probationary employee with the reasons for the employee's termination, deprives the employee of interest in liberty giving rise to name-clearing hearing, when reasons stated are based on evaluations of the employee, are all related to job performance and do not involve accusations of moral turpitude such as dishonesty or immorality, or character deficiencies?

II. Whether the mere inclusion in the probationary employee's personnel file of the public employer's reasons for termination, without proof of actual or likely disclosure to a third party, is "disclosure", necessitating a name-clearing hearing?

LIST OF PARTIES

The parties to the proceeding below are:

1. Petitioners, Plainview-Old Bethpage Central School District, Edward Metzendorf.

2. Respondent, Linda Donato.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Board of Education of the Central School District of Plainview-Old Bethpage, New York, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on September 24, 1996, the Second Circuit having denied Petitioners' petition for a rehearing en banc on November 20, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Appendix A) is reported at 96 F.3d 623 (1996); the Order of the District Court denying plaintiff's Motion for Summary Judgment and dismissing plaintiff's second cause of action [violation of plaintiff's rights under the Fourteenth Amendment (Appendix B)]; the District Court Judgment dismissing plaintiff's complaint (Appendix C); the Order of the Second Circuit denying Rehearing (Appendix D); and the Order of the United States Court of Appeals for the Second Circuit staying the mandate for sixty days (Appendix E).

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit is dated September 24, 1996. The Order from the Second Circuit denying a petition for a rehearing en banc is dated November 20, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

New York State Education Law, McKinney's Consolidated Laws of New York:

Section 3012. Tenure: Certain School Districts

1. (b) Principals, administrators, supervisors and all other members of the supervising staff of school districts, including common school districts and/or school districts employing fewer than eight teachers, other than city school districts, shall be

appointed by the board of education, or the trustees of a common school district, upon the recommendation of the superintendent of schools for a probationary period of three years. The service of a person appointed to any of such position may be discontinued at any time during the probationary period on the recommendation of the superintendent of schools, by a majority vote of the board of education or the trustees of a common school district.

Section 3031. Procedure when tenure not to be granted at conclusion of probationary period or when services to be discontinued.

Notwithstanding any other provision of this chapter: (a) boards of education, trustees of common school districts and boards of cooperative educational services shall review all recommendations not to appoint a person on tenure, and teachers, administrators and supervisors employed on probation by any school district or by any board of cooperative education services as to whom a recommendation is to be made that appointment on tenure not be granted or that their services be discontinued shall, at least thirty (30) days prior to the board meeting at which such recommendation is to be considered, be notified of such intended recommendation and the date of the board meeting at which it is to be considered. Such teacher, administrator and supervisor may, not later than twenty-one days prior to such meeting, request in writing that he be furnished with a written statement giving the reasons for such recommendation and within seven days thereafter such written statement shall be furnished. Such teacher, administrator and supervisor may file a written response to such statement with the district clerk not later than seven days prior to the date of the board meeting.

Section 3020. Dismissal of teacher

1. No person enjoying the benefits of tenure shall be disciplined or removed during a term of employment except for just cause and in accordance with the procedures specified in section three thousand twenty-a of this article or in accordance with alternate disciplinary procedures contained in a collective bargaining agreement covering his or her terms and conditions of employment that was effective on or before September first, nineteen hundred ninety-four and has been unaltered by renegotiation, or in accordance with alternative disciplinary procedures contained in a collective bargaining agreement covering his or her terms and conditions of employment that becomes effective on or after September first, nineteen hundred ninety-four; provided, however, that any such alternate disciplinary procedures contained in a collective bargaining agreement that becomes effective on or after September first, nineteen hundred ninety-four, must provide for the written election by the employee of either the procedures specified in such section three thousand twenty-a or the alternative disciplinary procedures contained in the collective bargaining agreement and must result in a disposition of the disciplinary charge within the amount of time allowed therefor under such section three thousand twenty-a.

FEDERAL RULES OF APPELLATE PROCEDURE, RULE 41(b)

Stay of Mandate Pending Petition for Certiorari

A party who files a motion requesting a stay of mandate pending petition to the Supreme Court for a writ of certiorari must file, at the same time, proof

of service on all other parties. The motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The stay cannot exceed 30 days unless the period is extended for cause shown or unless during the period of the stay, a notice from the clerk of the Supreme Court is filed showing that the party who has obtained the stay has filed a petition for the writ, in which case the stay will continue until final disposition by the Supreme Court. The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed. The court may require a bond or other security as a condition to the grant or continuance of a stay of the mandate.

STATEMENT OF THE CASE

This case involves an issue of national importance regarding a public employer's practices upon termination of a non-tenured employee. Linda Donato ("DONATO"), respondent herein, filed suit against the petitioner, Plainview-Old Bethpage Central School District ("DISTRICT"), claiming that her services had been terminated as retaliation for participation in a prior lawsuit, and further claiming that she was entitled to a pre-termination hearing because her property and liberty interests had been deprived. The United States District Court for the Eastern District of New York dismissed DONATO's first cause of action, claiming retaliatory termination and further held that neither DONATO's liberty interest nor property interest were deprived, and dismissed DONATO's second cause of action. The United States Court of Appeals for the Second Circuit, in its decision below, affirmed the dismissal of the retaliatory termination cause of action, and the dismissal of DONATO's claim that her property interest had been deprived, but determined that the DISTRICT had deprived DONATO of her liberty interest, finding that the list of reasons for the DISTRICT's termination of DONATO were

stigmatizing, and that placement of the list of reasons in DONATO's personnel file constituted disclosure. Petitioner believes that this determination is erroneous. It misunderstands applicable law and is in direct conflict with the rulings of other circuit courts of appeals.

The facts in this case are as follows. On September 1, 1991, pursuant to N.Y.S. Education Law §3012, DONATO was granted a probationary appointment to the position of Assistant Principal in the DISTRICT. (A-3) DONATO had previously been employed by the DISTRICT as a tenured social studies teacher, a position she later left voluntarily to accept a probationary appointment as chairperson of the social studies department. DONATO was granted tenure by the DISTRICT as a chairperson, which position was abolished by the DISTRICT in 1991, along with all other middle-school chairperson's positions.

At the conclusion of the 1991-1992 school year, despite having received negative evaluations from her supervisor, DONATO was conditionally re-hired to continue her probationary employment as an assistant principal. The condition for the re-hiring was that DONATO successfully address the areas of concern set forth in the Administrator's Evaluation of DONATO prepared by defendant Edward Metzendorf ("METZENDORF") and communicated to DONATO during the 1991-1992 school year (A-4). During the 1992-1993 school year, in an effort to aid DONATO, the DISTRICT and METZENDORF provided her with written and oral evaluations of her performance, together with suggested methods of improvement. (A-5) Notwithstanding the efforts of the DISTRICT and METZENDORF, and perhaps DONATO, in this regard, DONATO was unable to correct the deficiencies in her performance as an Assistant Principal previously identified by Defendants (A-5). As a result of DONATO's failure to successfully address the items which were of concern to her superiors, the Superintendent of Schools notified DONATO of his intention to recommend to the Board of Education that her services be discontinued (A-5). DONATO was afforded all rights under Education Law Section 3031. Specifically,

she was afforded the opportunity to request a statement of reasons, made such a request, and was provided with the reasons that served as the basis for the Superintendent's recommendation (A-6).

At its meeting of May 17, 1993, the Board of Education acted upon the Superintendent's recommendation and voted to terminate DONATO's employment in the DISTRICT, effective June 30, 1993, in accordance with the procedures set forth in Education Law, Section 3031 (A-5-6). DONATO did not exercise her right pursuant to New York State Civil Practice Law & Rules to challenge such determination. Based on the probationary nature of her employment and the fact that same was not terminated for any reasons to which a stigma may attach, DONATO was not afforded a pre-termination hearing.

Prior to her actual termination, DONATO commenced this action in U.S. District Court alleging that her termination was retaliatory in nature, and further claiming that she was entitled to a pre-termination hearing. DONATO moved for summary judgment on the retaliatory termination cause of action, and by Memorandum-Decision and Order, Justice Leonard Wexler denied DONATO's motion for summary judgment and granted summary judgment to the DISTRICT. (Appendix B, A-23)

DONATO's second cause of action, seeking a hearing and damages, came on for trial in August 1995, before Justice Wexler. At the conclusion of DONATO's case, Justice Wexler granted the DISTRICT's motion to dismiss the cause of action for DONATO'S failure to prove a prima facie case. (Appendix C, A-24)

DONATO then appealed both Justice Wexler's granting of summary judgment to the DISTRICT on the first cause of action, and the dismissal of DONATO's second cause of action, to the Circuit Court of Appeals for the Second Circuit, who affirmed the dismissal of the retaliatory termination cause of action, but reversed the dismissal of DONATO's claim for a

hearing, finding that DONATO's liberty interest had been deprived. (A-6, A-20).

Relying on its earlier decision in *Huntley v. Community School Board*, 543 F.2d 979 (2d Cir. 1976), the Second Circuit ruled that the list of reasons furnished to DONATO by the DISTRICT for her termination were so negative as to be stigmatizing, although the reasons were all related to DONATO's job performance, did not accuse DONATO of any act involving moral turpitude or character deficiencies and were furnished to DONATO at her request. Also relying on its earlier decision in *Brandt v. Bd. of Co-operative Educational Svcs.*, 820 F.2d 41 (2d Cir. 1987), the Second Circuit ruled that placement of the list of reasons furnished by the DISTRICT in DONATO's personnel file was the equivalent of disclosure of the reasons, although no actual or likely disclosure was ever alleged or proven.

The DISTRICT subsequently filed a Petition for Rehearing and Suggestion for Rehearing En Banc. The Second Circuit denied such Petition on November 20, 1996 (Appendix D, A-26), but stayed the Mandate on December 5, 1996 (Appendix E, A-28), pending Petition for Writ of Certiorari.

According to the Second Circuit, if a school district in New York complies with the requirements of the New York State Education Law and provides a probationary employee with the list of reasons for his or her termination, that employee will be entitled to a name-clearing hearing if the list of reasons is so complete as to question the employee's professional competence, and a copy of that list is placed in the employee's personnel file, whether actually distributed to third parties or not. In its view, a probationary employee who is terminated for minor reasons is entitled to less due process than an employee who is totally incompetent and is terminated because of that incompetence.

REASONS FOR GRANTING THE WRIT

1. The decision below misunderstands applicable law governing a public school district's obligation to provide a pre-termination hearing (or name clearing hearing) to non-tenured employees.

The decision of the Second Circuit in this action is in conflict with decisions of the Supreme Court and of the highest Court in the State of New York, requiring the review of the Supreme Court.

The body of law known as the New York State Education Law is a state statute designed to govern the actions of school districts and their administrators and boards of education. It also provides for the rights of school district employees and students. As such, the actions of the DISTRICT in hiring and terminating probationary and tenured employees are governed by the New York State Education Law, as is the granting of tenure to school district employees. The difference between probationary employees and tenured employees under the Education Law is distinct. Failure on the part of a school district to comply with the provisions of the Education Law, leaves the district vulnerable to actions on behalf of aggrieved employees and sanctions imposed by the New York State Education Department.

The determination of the Second Circuit, that the DISTRICT, in providing a probationary employee with the reasons for her termination, in compliance with the provisions of New York State Education Law, deprives the employee of her liberty interest places school districts in the untenable position of having to choose between: i) violating New York State Education Law §3031, which mandates that districts provide administrators who are about to be terminated, with a list of the reasons for such termination, upon request of such administrator; or ii) violating such administrator's due process

liberty interests, if a Court subsequently decides that the reasons given for termination amount to an allegation of professional incompetence. The Court's decision could also have the chilling effect of forcing the public employer to take the unattractive choice of granting tenure to newly hired employees indiscriminately, giving up its right to evaluate employees' job performance.

Likewise, the determination of the Second Circuit, that the DISTRICT, by merely placing the requested list of reasons for termination in the employee's personnel file has disclosed the reasons to third parties, also places the DISTRICT in an untenable situation. The collective bargaining agreement between the DISTRICT and its employees requires the DISTRICT to place a copy of any correspondence to the employee from the DISTRICT in the employee's personnel file, and gives the employee an opportunity to respond to that correspondence. There has been no allegation or proof in the factual record of this case that the contents of the employee's personnel file were ever revealed to third parties, or that it is the practice of the DISTRICT to reveal the contents of employees' personnel files to third parties. By holding that the placement of the requested list of reasons for termination in the employee's personnel file is the equivalent of "disclosure" under the holding of *Bishop v. Wood*, 426 U.S. 341 (1976), the Court forces the DISTRICT to either fail to comply with the requirements of the collective bargaining agreement, or risk defending an allegation that it has deprived an employee of his or her liberty interest.

(a) The rationale of the court below - In ruling that DONATO was entitled to a name-clearing hearing, (A-20, infra), the Second Circuit opined that accusations alleging some charge of moral turpitude "obviously can form the basis for a liberty claim," but that "stigmatizing allegations also include charges going to professional competence when the charges are sufficiently serious." (A-12, infra).

The Court stated that "stigmatizing statements by the government about an employee upon her discharge only implicate

a liberty interest when there is also public disclosure," citing *Bishop v. Wood*, supra, and then opined that the mere placement of the employer's statements in the employee's personnel file is the equivalent of public disclosure because "potential future employers undoubtedly will consult plaintiff's prior employer when she applies for supervisory positions."

(b) Misunderstanding of applicable case law - The Second Circuit's majority decision misunderstands and misapplies the Supreme Court decisions in *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Paul v. Davis*, 424 U.S. 693 (1976), that statements which may reflect adversely upon an employee's ability but which do not accuse the employee of something beyond incompetence do not rise to the level of "stigmatizing" statements which require a hearing. In *Roth*, supra at p. 573, the Supreme Court in ruling that the employee's liberty interest had not been deprived, stated that its ruling was based on the fact that the employer **"did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case."** That same position has been adopted and stated by the New York Court of Appeals, the highest court in the State, in *Lutwin v. Alleyne*, 58 NY2d 889 (1983). In *Lutwin*, supra at 891, the Court, citing *Roth*, supra, ruled that the charges including inability to acquire supportive staff, poor administrative and supervisory abilities, and failure to cooperate **"did not in any way implicate petitioner's good name, reputation, honor or integrity"** and therefore the **"Appellate Division (lower court) erred in granting petitioner a name-clearing hearing"** even though they specifically deemed the charge of failure to cooperate as a charge of insubordination, and despite the fact that the Board charges were disseminated to the public.

Furthermore, although the Second Circuit's majority decision correctly cites the leading Supreme Court case of *Bishop v. Wood*, supra, as authority for the doctrine that stigmatizing statements by the government about an employee upon her discharge only implicate a liberty interest when there is also

public disclosure, (A-14, infra), it erases the threshold of public disclosure required by *Bishop*, supra, by citing and expanding its own decision in *Brandt v. BOCES*, 820 F.2d 41, (2d Cir. 1987). In fact, the Supreme Court, in *Bishop*, supra, was clear in its desire to not have the Court or the federal government interfere with the "ultimate control of state personnel relationships" which they stated should remain "with the States." (*Bishop*, p. 350, 351, n. 14) The Court in *Brandt*, supra, said the requirement for public disclosure is "satisfied where the stigmatizing charges are placed in the discharged employee's personnel file ***and*** are likely to be disclosed to prospective employers." *Brandt*, p. 45 (emphasis ours). The conjunction "and" is an important part of that quotation. It is a two-prong test: mere placement in the file not being sufficient without a showing the file is likely to be disclosed. In fact, the Court in *Brandt*, p. 44, specifically stated "what is sufficient to constitute 'public disclosure' will vary with the circumstances of each case, and must be determined on a case-by-case basis. There is no support in the factual record of this case that DONATO's personnel file is likely to be disclosed.

Despite the fact that DONATO opposed the DISTRICT's motion to stay the issuance of the mandate, at no time did it even attempt to controvert the facts contained in the Affidavit of the District's Superintendent HENRY L. GRISHMAN, in support of the motion, sworn to on November 26, 1996 (Appendix F) that:

> **it is not the practice of the DISTRICT to release or reveal the contents of an employee's personnel file to any prospective employer. Each request for information from a prospective employer is treated on a case-by-case basis and appropriate recommendations are written by the DISTRICT. During the duration of my employment as Superintendent of the DISTRICT, no demands were made by any prospective employers for the release of DONATO's personnel file, and the contents of that file were not revealed to any prospective employers.**

It was at the specific request of DONATO that DISTRICT provided her with the reasons for her termination. There is no indication in the factual record that the statements provided to her were ever disseminated by DISTRICT or anyone else other than her. Nor is there any proof or allegation that DISTRICT would divulge the contents of her personnel file to anyone.

The Second Circuit's reasoning is because the allegations were in the employee's personnel file there existed a likelihood of disclosure. This reasoning is erroneous. The mere presence of stigmatizing allegations in an employee's personnel file is not actionable. *Longarzo v. Anker*, 578 F2d 469 (2nd Cir. 1978); *Walker v. Alexander*, 569 F2d 291 (5th Cir. 1978) and *Davis v. Oregon State*, 591 F2d 493 (9th Cir. 1978). Where it has been held that the likelihood of disclosure implicates a liberty interest, the courts have uniformly required proof beyond the mere presence of allegations in an employee's personnel file. *Perry v. Federal Bureau of Investigation*, 759 F2d 1271 (7th Cir. 1985); *Larry v. Lawlor*, 605 F2d 954 (7th Cir. 1978).

(c) The statutory scheme - New York State Education Law §3012(1)(b) provides that administrators (including assistant principals) be appointed for a probationary period of three years, and that the service of a person so appointed may be discontinued at any time during such probationary period. No provision for a pre-termination hearing is made for probationary appointees.

New York State Education Law §3031 provides that any probationary administrator who will not be recommended for tenure shall be notified of such intended recommendation at least thirty (30) days prior to the board meeting at which such recommendation is to be considered, and shall be notified of the date of the board meeting at which it is to be considered. This section of the law provides the probationary employee with the right to request in writing, not later than twenty-one days prior to such meeting, that he or she be furnished with a written statement giving the reasons for such recommendation

and within seven days thereafter such written statement shall be furnished. The employee may then file a written response to such statement with the district clerk not later than seven days prior to the date of the board meeting. No provision for a pre-termination hearing is made for probationary employees.

By contrast, those school district employees who have received tenure may only be dismissed for just cause which is to be determined at a hearing conducted in accordance with New York State Education Law.

If the majority decision is allowed to stand it will have a chilling effect on all municipal employers with respect to providing discharged employees with the reasons for their termination. As stated by Judge Altimari, in his dissenting opinion: "When faced with a probationary employee who performs below expectations, school districts will be reluctant to state all of that employee's shortcomings, for fear of triggering a liberty interest." (Dissenting opinion, App. A, A-21) This is a particularly distressing situation for school districts who must also comply with Section 3031 of the New York State Education Law which requires that school districts provide a statement of reasons for termination to an employee, upon the employee's request.

Furthermore, the decision in the instant case blurs the distinction between tenured employees and probationary employees. Under the provisions of Sections 3012 and 3020 of the New York State Education Law, tenured employees of school districts are entitled to pre-termination hearings which must result in proving "just cause" for their dismissal. Probationary employees may be discharged for no reason or for any reason, provided it is not a constitutionally protected reason, without the need for a hearing. The majority decision will have a chilling effect on government employers, risking less than truthful evaluations and a failure to comply with NYS Educ. Law 3031, so as to avoid stigmatizing the employee or having to offer name-clearing hearings in virtually every case of termination.

2. The decision below conflicts with the decisions of other U.S. Circuit Courts of Appeals.

The decision of the Second Circuit in this action is in conflict with decisions from several other Circuits, and has created great confusion across the nation regarding a public employer's obligation to grant non-tenured employees a pretermination or name clearing hearing, warranting a review by this Court.

This Court determined DONATO was deprived of her liberty interest under the Fourteenth Amendment based on the following list of reasons for termination supplied to DONATO by DISTRICT, at DONATO's request, based on DONATO's work performance, abilities and degree of competence:

Failure to perform scheduling responsibilities
Failure to effectively manage discipline at seventh and eighth grade levels
Poor secondary staff relations
Ineffective parent interaction
Failure to provide adequate instructional supervision
Failure to complete administrative responsibilities
Failure to consult with supervisor
Inability to accept constructive criticism; and
Ineffective commitment to the Middle School

Numerous cases at the Circuit Court level have followed the rule of *Roth*, supra, and *Paul*, supra, holding that stigmatizing charges involve accusations of moral turpitude such as dishonesty or immorality, or character deficiencies, and that statements such as those furnished to DONATO by the DISTRICT do not rise to the level of stigma necessitating a name-clearing hearing.

The statements of the respective employers in the following cases, sounding similar or identical to the reasons provided to DONATO by DISTRICT, have been held to be non-stigmatizing:

1. Uncooperative attitude - *Laborde v. Franklin Parish School Board*, 510 F2d 590 (**5th Cir.** 1975); *Jeffries v. Turkey Run Consolidated School Dist.*, 492 F2d 1 (**7th Cir.** 1974); *Raposa v. Meade School Dist.* 46-1, 790 F2d 1349 (**8th Cir.** 1986); *Stretten v. Wadsworth Veterans Hosp.*, 537 F2d 365 (**9th Cir.** 1976);

2. Insubordination - *Gray v. Union County Intermediate Education Dist.*, 520 F2d 803 (**9th Cir.** 1975) and *Walker v. Elbert*, 75 F3d 592 (**10th Cir.** 1996);

3. Failure to coordinate teaching with another teacher - *Shirck v. Thomas*, 486 F2d 691 (**7th Cir.** 1973);

4. Use of language unbecoming a teacher - *Weathers v. West Yuma County School Dist. RJ 1*, 530 F2d 1335 (**10th Cir.** 1976);

5. Use of harsh discipline - *LaBorde*, supra;

6. Improper or substandard job performance - *Norbeck v. Davenport Community School Dist.*, 545 F2d 889 (**8th Cir.** 1976), *Roley v. Pierce County Fire Protection Dist. No. 4*, 869 F2d 491 (**9th Cir.** 1989), *Paige v. Harris*, 584 F2d 178 (**7th Cir.** 1978);

7. Failure to maintain discipline - *Smith v. Bd. of Education of Urbana School Dist. No. 116*, 708 F2d 258 (**7th Cir.** 1983);

8. Incompetence - *Hayes v. Phoenix-Talent School Dist. No. 4*, 893 F2d 235 (**9th Cir.** 1990).

These same Circuit Courts, in the following cases, have confirmed their position on what types of statements are stigmatizing by finding the following statements of employers to be stigmatizing because they included accusations of moral turpitude or character deficiencies:

1. Dishonesty - *McNeill v. Butz*, 480 F2d 314 (**4th Cir.** 1973);

2. Mental Illness - *Lombard v. Bd. of Education*, 502 F2d 631 (**2d Cir.** 1974);

3. Drunkenness - *Dennis v. S&S Consolidated Rural H.S. Dist.*, 577 F2d 338 (**5th Cir.** 1978);

4. Racial prejudice - *Wellner v. Minnesota State Junior College*, 487 F2d 153 (**8th Cir.** 1973);

5. Sexual misconduct with students - *Austin v. Bd. of Education*. 562 F2d 446 (**7th Cir.** 1977);

6. Immorality - *Vanelli v. Reynolds School Dist. No. 7*, 667 F2d 773 (**9th Cir.** 1982); and

7. Physical abuse of children - *Kendall v. Bd. of Education of Memphis City Schools*, 627 F2d 1 (**6th Cir.** 1980).

The position of the Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Circuits, all of which are contrary to the Circuit Court's decision in the instant case, was stated by the Ninth Circuit in *Stretten v. Wadsworth Veterans Hospital*, 537 F2d 361 (1976):

> **Liberty is not infringed by a label of incompetence, the repercussions of which primarily affect professional life, and which may well force the individual down one or more notches in the professional hierarchy. The distinction is not perfect; our utility affects our dignity and worth whether viewed from within or without. However, implicit in such a distinction is the notion that the constitutional need for procedural protection is not strong when the charge (e.g., incompetence) involves a matter which is peculiarly within the scope of employer-employee relations and when the likely results of even a false charge are reduced economic returns and diminished prestige, but not permanent exclusion from, or protracted interruption of, gainful employment within the trade or profession. Employers, including the**

Veterans' Administration, have a strong interest in conserving resources and dealing expeditiously with incompetent employees.

It is in the best interest of the national labor policy to establish a brightline standard for determining whether a probationary government employee, whose services are terminated, is entitled to a name-clearing hearing. It is the long-standing policy of the Supreme Court to grant certiorari where Circuit Court decisions are in conflict with decisions of other Circuit Courts, especially when it concerns an important issue regarding national labor policy. (See *Braxton v. United States*, 500 U.S. 344 (1991), *Federal Trade Commission v. Flotill Products, Inc.*, 389 U.S. 179 (1967), *United Steelworkers of America, AFL-CIO v. National Labor Relations Board*, 376 U.S. 492 (1964), *Sinclair Refining Company v. Atkinson*, 370 U.S. 195 (1962))

Based upon the great confusion which exists on the important issue of constitutional law, concerning the due process to be accorded to probationary public employees upon their termination, because of the split in the federal Circuit Courts, a review by this Court is warranted and is most essential.

3. The United States Court of Appeals for the Second Circuit has acknowledged that this case presents a substantial question of law and is ripe for review by the United States Supreme Court.

In response to Petitioner's motion, the United States Court of Appeals for the Second Circuit has issued an Order Staying Issuance of the Mandate in this action for sixty days or until a Petition for Writ of Certiorari is filed (Appendix E, A-28).

Under Federal Rules of Appellate Practice Rule 41(b), the stay of the Mandate is not automatically granted. The issuance of the Mandate will only be stayed if the Circuit Court decides that the moving party has demonstrated **"that a petition for certiorari would present a substantial question and that there is good cause for a stay."**

Therefore, the granting of the stay by the Circuit Court, in fact by the same Judges who originally heard the appeal, is an express statement by the Second Circuit that the Petition for Writ of Certiorari presents issues of law of substantial importance which merits review by the United States Supreme Court.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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Dated: Plainview, New York
December 16, 1996

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1418 -- August Term 1995

(Argued May 10, 1996 Decided September 24, 1996)

Docket No. 95-7862

LINDA DONATO,
{*Plaintiff-Appellant*},

v.

PLAINVIEW-OLD BETHPAGE CENTRAL
SCHOOL DISTRICT;
EDWARD METZENDORF,
{*Defendants-Appellees*}.

Before: CARDAMONE, ALTIMARI, and PARKER {*Circuit Judges*}

Plaintiff Linda Donato appeals from a judgment entered August 7, 1995 by the United States District Court for the Eastern District of New York (Wexler, J.) dismissing both her Fourteenth Amendment due process claim brought under 42 U.S.C. Sec. 1983 and her retaliatory discharge claim brought under the Civil Rights Act of 1964.

Affirmed in part, reversed in part, and remanded.

Judge Altimari concurs in part and dissents in part in a separate opinion and votes to affirm the judgment of the district court in full.

JOSEPH P. MARRO, New York, New York, {for Plaintiff-Appellant}.

GREGORY J. GUERCIO, Plainview, New York (Guercio & Guercio, Plainview, New York, of counsel), {for Defendants-Appellees}.

CARDAMONE, {Circuit Judge}:

At the time of her discharge from employment, plaintiff Linda Donato (plaintiff or appellant) was a probationary assistant principal in the Plainview-Old Bethpage Central School District (District). An assistant principal serves a number of constituencies, ordinarily doing better with some than others; the exceptional assistant principal does well with all of them. But here, according to her employer, plaintiff did well with none of the constituencies -- not with staff, students, parents, teachers, or with her supervisor, the principal. In short, she allegedly did nothing right and everything wrong.

Plaintiff appeals from a judgment entered August 7, 1995 by the United States District Court for the Eastern District of New York (Wexler, J.) dismissing both her Fourteenth Amendment due process claim brought under 42 U.S.C. Sec. 1983 and her retaliatory discharge claim brought under the Civil Rights Act of 1964. The latter ruling necessitates a brief discussion of the law of retaliatory discharge. Plaintiff's challenge to the first decision requires us to consider what process is constitutionally due a public employee discharged amidst allegedly stigmatizing accusations of professional incompetence. When acting as an employer, the state must still heed the Fourteenth Amendment's command not to "deprive any person of life, liberty, or property, without due process of law." Because the District's charges leveled against plaintiff strike at the heart of her professional competence, damaging her professional reputation to such a degree as to virtually foreclose her ability to continue working in her chosen field of 28 years, the charges implicated and deprived her of a liberty interest under the Fourteenth Amendment. Such a

deprivation requires that she be granted a name-clearing hearing.

BACKGROUND

A. Underlying Facts

Plaintiff Donato, a resident of Smithtown, New York, was first employed by the defendant District as a social studies teacher on September 1, 1966 and received tenure for that position in 1969. On September 1, 1981 Donato became chairperson of the Social Studies Department and obtained tenure as chairperson three years later.

In 1978, before her appointment as chairperson, Donato and several other women teachers challenged the District's mandatory maternity leave policy as discriminatory. The parties resolved the lawsuit, in which Donato's name appeared as lead plaintiff, in a 1981 settlement agreement that restored seniority rights and certain other benefits to Donato and the other plaintiffs. When the State Teachers Retirement System refused to grant retirement service credits as contemplated by the settlement agreement, New York State enacted legislation ordering that the credits be granted. See Plainview-Old Bethpage Central School District - Service Credit for Certain Teachers, 1988 N.Y. Laws ch. 786. The District responded by bringing a lawsuit attacking the state statute's constitutionality. See Board of Educ., Plainview-Old Bethpage Cent. Sch. Dist. v. Donato, No. 3420-89 (N.Y. Sup. Ct. Aug. 18, 1989) (mem. op.). In dismissing the District's suit, the New York State Supreme Court, Albany County, observed that the District had used every imaginable available remedy to avoid paying the teachers' benefits.

On August 16, 1991 Donato's career as an educator continued its upward spiral. The Superintendent of Schools appointed plaintiff to the position of Junior High School Assistant Principal for the school year starting on September 1, 1991. It is plaintiff's performance while serving in this capacity that is the subject of the instant litigation. The Superintendent's hiring notice described plaintiff's appointment as "probationary."

She was not eligible for tenure until September 1, 1994, the date that would mark the end of the three year probationary period.

According to Donato, she served her first year as assistant principal without any difficulty. Her immediate supervisor, Principal Edward Metzendorf (also a defendant in the present action), wrote a memorandum dated April 10, 1992 evaluating Donato's first year as assistant principal. His critique suggested plaintiff accelerate her efforts to learn the master scheduling system, become more effective in managing discipline, improve communications with other staff members, provide improved instructional supervision, and work longer hours. Donato sent Metzendorf a reply memorandum defending her performance in all these areas.

Plaintiff contends that at the conclusion of her first academic year as assistant principal in June 1992, the District and Metzendorf began a course of conduct designed to damage her professional career. As proof, she points to several examples. First, on July 1, 1992 Metzendorf prepared a memorandum - which he placed in plaintiff's file - criticizing her decision to leave on vacation in early July, because leaving interfered with her scheduling responsibilities. Donato wrote in response that Metzendorf had approved her vacation plans and that she had fully complied with all her contractual obligations. She also described Metzendorf's placement of this memorandum in her personnel file without first affording her an opportunity to refute his assertions as an unprofessional action that violated her rights. Despite this negative action by Metzendorf, his next evaluation of plaintiff was more favorable. Metzendorf's September 1992 summary evaluation, in which he conditionally recommended continuing plaintiff's probationary status, referred to "many positive aspects" of plaintiff's conduct and praised her "extensive administrative experience."

Second, plaintiff alleges that Metzendorf made a comment at a routine school board meeting on September 23, 1992 that reflected the District's animus towards her. At this meeting,

she asked Metzendorf why he had recently made certain negative statements about her. He replied that the District Superintendent and the Board of Education (Board) had told him to put things in writing about her, and added that if he did not follow the Board's instructions, they would "chop [his] legs off." Metzendorf says he spoke these words in a different context and was in fact referring to the District's desire to make certain spending cuts.

Third, Donato disputes the accuracy of three evaluations prepared by Metzendorf. In November 1992, he wrote that plaintiff lacked competence in the area of master scheduling, was ineffective as a disciplinarian, and showed a lack of concern in her interactions with parents. In a December 1992 follow-up evaluation, Metzendorf detailed the chronology of her lapses in class-scheduling and stated that the events "indicate[] [plaintiff's] lack of understanding of the scheduling of classes ... and [her] lack of commitment to this assigned responsibility." He also condemned her handling of student harassment problems as "ineffective." In his third performance evaluation, made in February 1993, Metzendorf again referred to plaintiff's insufficient effort and commitment to her scheduling tasks and also noted her lack of understanding of teacher schedules. He discussed her failure to investigate possible gang activity in the school and described her instructional supervision as "insufficient in scope and quantity." Metzendorf also criticized Donato for repeated lateness and inconsi stent lunchroom supervision.

Donato insists that Metzendorf's evaluations "contained factual distortions and untrue incidents," as well as "misstatements of fact and outright fabrications." These evaluations were placed in her personnel file and thereby became part of her permanent employment record.

As a result of these adverse reports, District Superintendent Henry Grishman wrote to plaintiff on April 2, 1993, telling her of his recommendation that the Board remove her as assistant principal as of June 30, 1993. The Board accepted his recommendation and, on May 17, 1993, voted to terminate

Donato's employment. When plaintiff requested a statement of reasons for Grishman's recommendation, he sent her the following list, which he described as not being all-inclusive:

> 1. Failure to perform the master scheduling responsibilities;
>
> 2. Failure to effectively manage discipline at the seventh and eighth grade levels;
>
> 3. Poor secondary staff relations;
>
> 4. Ineffective parent interaction[;]
>
> 5. Failure to provide adequate instructional supervision;
>
> 6. Failure to complete administrative responsibilities, such as cafeteria supervision and attendance at meetings;
>
> 7. Failure to consult with supervisor regarding summer work schedule;
>
> 8. Inability to accept constructive criticism; and
>
> 9. Ineffective commitment to the Middle School.

As with the Metzendorf evaluations, Donato denies the accuracy of all these allegations.

B. District Court Proceedings

Plaintiff originally filed suit on March 30, 1993 against the District and Metzendorf in the United States District Court for the Eastern District of New York (Wexler, J.). She claimed in her complaint that Metzendorf prepared negative evaluations to retaliate against her for her involvement in the prior discrimination lawsuit, and that such action violated Title VII of the 1964 Civil Rights Act. See 42 U.S.C. Sec. 2000e-3(a).

In June 1993 Donato filed an amended complaint that included two causes of action. She again contended that the District's negative evaluations and subsequent termination

constituted a course of retaliatory conduct to punish her for opposing its unlawful maternity leave policy. But she added a cause of action alleging that the District's termination of her employment without a hearing violated rights guaranteed by the Constitution's Fourteenth Amendment and claimed that her civil rights had been violated under 42 U.S.C. Sec. 1983. She sought a permanent injunction against further discrimination, a total of $4 million in actual and punitive damages, and attorneys' fees pursuant to 42 U.S.C. Sec. 2000e-5k.

In her complaint, Donato disputed the truth and accuracy of the several Metzendorf memoranda and described Grishman's statement of reasons for her termination as filled with "intentional fabrications." Plaintiff contended that the defendants had taken these actions in an effort to damage her professional career. She refuted the District's charges against her by pointing to her many years of satisfactory service as a teacher and chairperson, her contributions to the school curriculum, and the various educational awards she had received.

When plaintiff moved for summary judgment on her due process claim, the district court denied it and instead dismissed that cause of action without an opinion. Later, the court presided over a bench trial to decide the retaliatory discharge cause of action. Plaintiff testified on her own behalf and called three witnesses -- Robert Goldstein, Benjamin Taubenfeld, and Mario Colleluori. Goldstein, another school official, testified about the September 1992 meeting in which Metzendorf purportedly stated that unless he disparaged Donato's work, the Board would "chop [his] legs off." Taubenfeld testified as a hostile witness. He served as a Board member during most of the 20 years before trial, including the time when the Board dismissed Donato. Donato asked him questions about certain telephone conversations she had with him. When Taubenfeld failed to remember them, Donato played tape recordings of the conversations. In the recordings, Taubenfeld agreed with Donato's assertion that Metzendorf was "falsifying statements." Taubenfeld also commented that "[e]verything that goes on here [at the school] is phoney as the day is long," and he blamed Ginger Lieberman and Anna

Goidell, two other Board members, for the deception. Colleluori, another Board member, testified briefly but added nothing to Donato's case.

After plaintiff rested, the defendants moved to dismiss the retaliatory dismissal claim, arguing that plaintiff failed to show a connection between her firing and her participation in the maternity leave lawsuit. The district court granted the motion with the following explanation: "I find there's no believable evidence in this case of retaliation. I believe the plaintiff has misstated, has done so many improper things in this case she is unworthy of belief. And as the finder of fact, I find insufficient evidence to allow this case to go any further. Dismissed."

With both causes of action in plaintiff's complaint now dismissed, the district court entered final judgment on August 7, 1995. Donato appeals from the dismissal of her due process claim and her retaliatory discharge claim.

DISCUSSION

Donato contends on appeal that the District deprived her of property and liberty without due process of law, in violation of the Due Process Clause of the Fourteenth Amendment. Our inquiry begins not by looking to the weight of plaintiff's interest in her probationary position and her reputation, but to the nature of that interest. We must determine whether the challenged state action infringed a protected constitutional right which plaintiff had. If the interest she asserts is not of a constitutional dimension, i.e., not a protected property or liberty interest, then her arguments must fail. See Board of Regents v. Roth}, 408 U.S. 564, 570-71 (1972).

I Property Interest

Plaintiff first asserts the loss of a protected property interest. Although the Constitution protects property interests, it does not create them. Rather, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support

claims of entitlement to those benefits." Roth, 408 U.S. at 577. State law therefore guides us in deciding whether plaintiff possessed only an unprotected unilateral expectation of employment, or instead had a constitutionally-protected "legitimate claim of entitlement." Id.; see also Martz v. Incorporated Village of Valley Stream, 22 F.3d 26, 29-30 (2d Cir. 1994).

Plaintiff's hiring notice clearly described her appointment as probationary under the Education Law of New York. State law provides that administrators are appointed "for a probationary period of three years." N.Y. Educ. Law Sec. 3012(1)(b) (McKinney 1995). The statute adds that "[t]he service of a person appointed . . . may be discontinued at any time during the probationary period on the recommendation of the superintendent of schools, by a majority vote of the board of education." Id. When a superintendent recommends to the board of education that a probationary employee be denied tenure or terminated, the employee must be notified of this recommendation and given, if she requests, a written statement of reasons and an opportunity to file a written response within seven days of the board meeting. N.Y. Educ. Law Sec. 3031 (McKinney 1995). Although Sec. 3031 did not extend to administrative personnel when the Board dismissed Donato, see Robinson v. Bruni, 193 AD2d 1072 (4th Dep't 1993); 1993 N.Y. Laws ch. 691 (inserting references to supervisors and administrators), plaintiff nonetheless received a written statement of reasons for her termination.

Hence, New York law provided no basis for Donato to believe that she had a legitimate claim of entitlement to continued employment as an assistant principal. Rather, the law expressly permitted her termination at any time during her probationary period. Appellant maintains that because her notice of appointment stated she would be eligible for tenure on September 1, 1994, the agreement implied that she would be allowed to complete her three years of probationary employment. This argument has no merit because Sec. 3012 expressly states that a probationary appointee may be terminated at any time. The very nature of a probationary appointment --

as the term itself implies -- is that employment may be terminated should the employer be dissatisfied.

Moreover, plaintiff can point to no District "policies and practices," Perry v. Sindermann, 408 U.S. 593, 603 (1972), sufficient to create an implied understanding that the express terms of Sec. 3012 are somehow inapplicable. Nor can she plausibly urge that the District's previous decisions to grant her tenure in her roles as teacher and department chairperson "carry over" to create a legitimate expectation of an implied form of tenure as assistant principal. These prior years of service were in different positions, and state law generally does not allow nonqualifying service to create tenure. See Yanoff v. Commissioner of Educ., 66 AD2d 919, 920 (3d Dep't 1978), appeal denied, 47 NY2d 711 (1979).

Appellant correctly points out that Sec. 3012 does not give the Board carte blanche to fire her for any reason at all. For example, a discharge motivated by an unconstitutional reason, such as racial animus or religious bigotry, would be impermissible whatever the terms of her employment. See Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 898 (1961). But these constitutional constraints on the Board's discretion do not create a property interest for plaintiff in her probationary position as assistant principal.

Nor do Donato's financial need or the longevity of her service give her an interest in continuing employment. In the absence of a state-law entitlement to her position, these more "abstract" concerns do not constitute a property interest. Roth, 408 U.S. at 578. Appellant's reliance on Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985), can give her no comfort. Loudermill was a "classified civil service employee" who could not be removed without good cause. Id. at 538-39 & n.4. Ruling that this constituted a form of tenure, as the state employer initially conceded, the Supreme Court ultimately concluded that Loudermill had a property interest in his position. Id. at 539 & n.5. Because Donato lacked tenure, Loudermill provides her no help. For all these reasons, we

reject plaintiff's argument that the Board's action deprived her of a constitutionally-protected property interest.

II Liberty Interest

A. Constitutional Background

Having disposed of plaintiff's property interest claim, we turn our attention to her claim that her discharge deprived her of liberty without due process of law. Liberty, as enshrined in the Fourteenth Amendment, is a "broad" notion, Roth, 408 U.S. at 572, and one of the many freedoms it encompasses is the freedom "to engage in any of the common occupations of life," Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Under some circumstances, a state's refusal to rehire an employee implicates the employee's liberty interests. See Roth, 408 U.S. at 573.

However, as understood by the Fourteenth Amendment, a decision not to reemploy, standing alone, does not deprive an employee of liberty. Id. at 575. Special aggravating circumstances are needed to implicate a liberty interest. For instance, when the state fires an employee and publicly charges that she acted dishonestly or immorally, due process guarantees the employee an opportunity to defend her "good name, reputation, honor or integrity." Id. at 573 (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)). A free-standing defamatory statement made by a state official about an employee is not a constitutional deprivation. Instead, it is properly viewed as a state tort of defamation. But a defamatory statement about an employee implicates a liberty interest when it is made during the course of that employee's termination from employment. See Paul v. Davis, 424 U.S. 693, 709-10 (1976); Martz, 22 F.3d at 32 ("concurrent temporal link between the defamation and the dismissal is necessary" to claim a deprivation of liberty); Easton v. Sundram, 947 F.2d 1011, 1016 (2d Cir. 1991) (requiring "stigma plus"), cert. denied, 504 U.S. 911 (1992).

Stigmatizing comments may include matters other than charges of illegality, dishonesty, or immorality. Quinn v.

Syracuse Model Neighborhood Corp., 613 F.2d 438, 446 n.4 (2d Cir. 1980). The test of whether a state employer's decision not to rehire an employee denies that employee due process is met when it deprives her of the "freedom to take advantage of other employment opportunities." Roth, 408 U.S. at 573. An employee charged with derelictions largely within her own power to correct is not deprived of such an interest. See Russell v. Hodges, 470 F.2d 212, 217 (2d Cir. 1972) (Friendly, J.). By contrast, a government announcement that it has fired an employee for incompetence or because she can no longer do the job is "'considerably graver' and carries more potential for future disqualification from employment than a statement that the individual performed a job poorly." O'Neill v. City of Auburn, 23 F.3d 685, 692 (2d Cir. 1994).

Yet, even governmental allegations of professional incompetence do not implicate a liberty interest in every instance. Such allegations will support a right to a name-clearing hearing only when they denigrate the employee's competence as a professional and impugn the employee's professional reputation in such a fashion as to effectively put a significant roadblock in that employee's continued ability to practice his or her profession. Id. at 692-93. Huntley v. Community Sch. Bd., 543 F.2d 979 (2d Cir. 1976), cert. denied, 430 U.S. 929 (1977), is instructive. Huntley was the acting principal of an intermediate school in Brooklyn. Upon terminating his employment, the local school board released a statement of charges against him that included the following remarks

> Mr. Huntley has . . . failed to demonstrate that quality of professional leadership necessary to effectively deal with the educational program at [the school]....
>
> [He] has not been able to implement an effective educational program. He has demonstrated an inability to provide the necessary leadership in working with a staff of professional teachers and supervisors. He has not provided for the basic safety of the children and staff of the school. He has failed

> to maintain a reasonably functional educational plant that is conducive to an effective learning environment.
>
> [He] has not effectively resolved problems that occurred in the administration and supervision of the school. . . .
>
> The leadership of Mr. Huntley . . . has created a climate of confusion and discontent in the school. The educational climate . . . is now one of general disorder thus depriving many children of a proper and effective learning situation.

Id. at 982 n.4.

Huntley sued alleging that the board had deprived him of liberty without due process of law. On appeal, we explained that "[h]aving discharged Huntley with a public statement of these charges, it is unlikely that Huntley would ever have a chance to obtain another supervisory position -- in the public schools or elsewhere." Id. at 985. Because the superintendent's comments "[went] to the very heart of Huntley's professional competence" and "drastically impaired" his chance of receiving another supervisory position, we held that the board's actions implicated a liberty interest. Id.

B. Liberty Interest In Instant Case

The similarities between Huntley and the instant case are striking. Both discharged supervisors received strongly negative evaluations of their skills in the areas of discipline, staff relations, educational and instructional supervision, administrative responsibilities, and leadership. In each case, the statement of reasons for termination reads like a bill of indictment, methodically reciting a litany of lack of professional competence. Taken together, we think the comments in the instant case are so harsh as to be likely to persuade any other school board not to hire plaintiff as a supervisor.

Decisional law bolsters Donato's contention that her termination implicated a liberty interest. In Baden v. Koch, 799 F.2d

825, 827, 831 (2d Cir. 1986), the Chief Medical Examiner of New York City was demoted one level to the position of Deputy amidst negative public comment concerning his ability. We held that this demotion may have implicated a "weak liberty interest." Id. at 831. Here, Donato was not simply demoted -- she was fired by her employer of 28 years. Although O'Neill, 23 F.3d at 693, explained that "vague statements of unspecified 'incompetence'" would not harm an employee's professional reputation so as to require a hearing, the Metzendorf evaluations and the District's statement of reasons for Donato's discharge are not vague statements of incompetence. They are extensively detailed lists of her supposed professional failings.

Appellant also satisfies the other requirements for stating a liberty interest. Stigmatizing statements by the government about an employee upon her discharge only implicate a liberty interest when there is also public disclosure. See Bishop v. Wood, 426 U.S. 341, 348 (1976); see also Loudermill, 470 U.S. at 547 n.13 (upholding dismissal of a liberty claim due to absence of publication). This requirement is "satisfied where the stigmatizing charges are placed in the discharged employee's personnel file and are likely to be disclosed to prospective employers." Brandt v. Board of Coop. Educ. Servs., 820 F.2d 41, 45 (2d Cir. 1987); see also Velger v. Cawley, 525 F.2d 334, 336 (2d Cir. 1975), rev'd on other grounds sub nom. Codd v. Velger, 429 U.S. 624 (1977). We have recognized, in fact, that this is the very action that circulates the stigmatization. Valmonte v. Bane, 18 F.3d 992, 1000 (2d Cir. 1994). Potential future employers undoubtedly will consult plaintiff's prior employer when she applies for supervisory positions. See Velger, 525 F.2d at 336 (job applicants usually required to disclose personnel files to prospective employers). Appellant also strongly disputes the accuracy of the District's comments, another showing required for a plaintiff to state a liberty claim. See Codd, 429 U.S. at 627.

Defendants argue that even though the circumstances surrounding plaintiff's termination may make it more difficult for her to find employment as a supervisor, she remains free

to seek another type of employment. Quite the contrary. As we made clear in Huntley, 543 F.2d at 985, a significant difference exists between a teaching and a supervisory position. It is of little consequence to our analysis that appellant is not foreclosed from finding employment in some other line of work outside the education field. Due process protects the freedom "to engage in any of the common occupations of life." Meyer, 262 U.S. at 399 (emphasis supplied).

Defendants also contend that an employee is only deprived of a liberty interest when the government "allege[s] some charge of moral turpitude." Such accusations obviously can form the basis for a liberty claim. See, e.g., Brandt, 820 F.2d at 42 (accusations that a teacher sexually abused autistic children); Velger, 525 F.2d at 336 (allegations that police officer threatened to commit suicide). Nonetheless, stigmatizing allegations also include charges going to professional competence when the charges are sufficiently serious. See O'Neill, 23 F.3d at 692-93; Quinn, 613 F.2d at 446 n.4; Huntley, 543 F.2d at 985. Donato's dismissal is far more stigmatizing than those of other public employees whose claims have failed. See, e.g., Roth, 408 U.S. at 568, 574 & n.13 (dismissal of employee without any statement of reasons only hypothetically affects future employment prospects); Russell, 470 F.2d at 215 n.2, 217 (rejecting claims by employees terminated for no stated reason, due to a knee injury, or due to absenteeism and incorrect clothing respectively).

The presence or absence of a literal charge of incompetence is not dispositive of the question before us. Compare Huntley, 543 F.2d at 982 n.4, 985 (specific allegations amounted to charge of incompetence and implicated liberty interest though the word "incompetence" not used by employer) O'Neill, 23 F.3d at 692-93 (explicit charge of "incompetence" was too vague to implicate liberty interest). We look to the substance of the employer's comments when viewed as a whole rather than to any label attached to them.

It could be argued that because N.Y. Educ. Law Sec. 3031 requires that school districts provide a statement of reasons

for termination (upon an employee's request), our decision puts state employers in a daunting dilemma between the Due Process Clause and state law, and that the public employer might be said to be like Odysseus, trapped between the six-headed monster, Skylla, and the destructive whirlpool Charybdis. See Homer, The Odyssey 185-92 (Richmond Lattimore trans., Harper & Row 1967). We do not subscribe to that view. A law like Sec. 3031, which requires the government to explain its reasons for termination, is beneficial to both the employee and the public alike. After all, a constitutional rule that strongly discourages the government from providing its employees with the reasons for their dismissal for fear they will be held stigmatizing might, in the long run, harm more workers than it helped. See Russell, 470 F.2d at 217.

In most cases a state employer's criticism will not be so stigmatizing as to foreclose the employee's freedom to seek other employment. Moreover, constitutional interpretation cannot be guided simply by what is efficacious -- we must ask whether a given government action is constitutional. See Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1223, 1302 (1995). When the state makes stigmatizing allegations in the course of dismissing an employee, such action implicates the protections of the Fourteenth Amendment, and we must enforce the Constitution even when the state is perhaps thereby burdened by having to recalibrate its employment practices.

Here, the accusations made against Donato go to the heart of her professional competence and damage her professional reputation to such an extent as to severely impede her ability to continue in the education field in a supervisory capacity. As a consequence, the defendant District deprived plaintiff of a liberty interest.

C. Remedy

Because plaintiff was deprived of liberty without due process of law, we now consider what process is due. Since due

process is a flexible notion, the procedural protection accorded a constitutional interest is determined by reference to the particular circumstances of a given case. See Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

The Supreme Court teaches that when a government employee is dismissed for stigmatizing reasons that seriously imperil the opportunity to acquire future employment, the employee is entitled to "an opportunity to refute the charge." Roth, 408 U.S. at 573 & n.12; see also Codd, 429 U.S. at 627; Baden, 799 F.2d at 832. A hearing must be held for the limited purpose of giving a discharged employee an opportunity to clear her name. A name-clearing hearing significantly reduces the risk that an employee will be dismissed with false stigmatizing charges placed in her personnel file. Even if Sec. 3031 had provided Donato an opportunity to present written comments, such a remedy is insufficient under Roth and Codd to satisfy the requirement of a name-clearing hearing.

The employer need not rehire the employee even if she can prove the inaccuracy of the stigmatizing allegations. See Roth, 408 U.S. at 573 n.12. But, when and if the allegations are shown to be false, their removal from the employee's file restores her freedom to seek future employment. Donato did not receive a name-clearing hearing. The district court, on remand, should ensure that such a hearing is accorded her. The task of directing the fair hearing is confided in the district court and that hearing must of course conform to the requirements of due process. See Goldberg v. Kelly, 397 U.S. 254, 266-71 (discussing "fair hearing" requirements). Should the charges be proven false, the district court should consider the factual and legal merits of Donato's claim for damages, a subject we do not reach or address. If the reasons for termination are shown to be accurate, that ends the matter.

III Retaliatory Discharge

The plaintiff's retaliatory discharge claim was tried before the district court sitting without a jury. After plaintiff rested, her claim was dismissed due to insufficient evidence of retaliation. The trial court explained as the finder of fact that

plaintiff "has misstated, has done so many improper things in this case she is unworthy of belief." On appeal, plaintiff contends that she proved a prima facie case of retaliatory discharge, and that her claim was wrongly dismissed.

Retaliatory discharge claims may be based upon Title VII of the Civil Rights Act of 1964, which makes it unlawful for an employer to discriminate against an employee for opposing an employment practice that violates the Act, 42 U.S.C. Sec. 2000e-3(a) (1994). Such claims are analyzed under the three-step burden shifting approach originally explained in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). See Tomka v. Seiler Corp., 66 F.3d 1295, 1308 (2d Cir. 1995).

To establish a prima facie case of retaliatory discharge, the plaintiff must show: "i) [her] participation in a protected activity known to the defendant; ii) an employment action disadvantaging the plaintiff; and iii) a causal connection between the protected activity and the adverse employment action." Id.; see also Johnson v. Palma, 931 F.2d 203, 207 (2d Cir. 1991). At this stage, plaintiff's burden is de minimis. Tomka, 66 F.3d at 1308. Once a prima facie case is made out, the burden shifts to defendant to demonstrate a legitimate nondiscriminatory reason for its decision. If such a reason is articulated, plaintiff must then prove that the proffered reason was a pretext for retaliation and that defendant's real motivation was the impermissible retaliatory motive. Id.

Here, Donato established both her participation in a protected activity (the maternity leave litigation) and the adverse employment action (her discharge). The contested issue therefore was whether plaintiff adduced sufficient evidence to prove a causal connection between these two events. Appellant presented some evidence that could be construed as pointing to a causal connection, such as the obvious rancor surrounding the contentious litigation, Metzendorf's rationalization that the Board threatened to chop off his legs if he did not discredit plaintiff, and the tape-recorded phone conversation in which Taubenfeld told Donato of the Board's enmity toward her.

But the district court rejected the plaintiff's evidence as not "believable."

Fed. R. Civ. P. 52(a) provides that "[f]indings of fact ... shall not be set aside unless clearly erroneous" and further states that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." The Supreme Court instructs that "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985). Further, we must accord great deference to the trial court's findings regarding credibility because the trial judge is in the best position to evaluate a witness's demeanor and tone of voice as well as other mannerisms that bear heavily on one's belief in what the witness says. Id. at 575.

In this case, which turned largely on the believability of the plaintiff and her assertions, the district court was in the best position to determine the credibility of plaintiff and her witnesses. Because no documents or objective evidence support Donato's claim of retaliation, the trial court naturally based its decision regarding causation on witness credibility. As we lack a "definite and firm conviction that a mistake has been committed," United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), we cannot describe the district court's factual findings as clearly erroneous. Having found that plaintiff presented no credible evidence of a causal connection between her involvement in the maternity leave litigation and her loss of employment, the district court properly dismissed plaintiff's retaliatory discharge action.

Finally, appellant contends that the district court failed adequately to "set forth the findings of fact and conclusions of law which constitute the grounds of its action." Fed. R. Civ. P. 52(a). She asks that we vacate the order and remand with instructions to develop adequate findings, our customary practice when a district court's findings are so insufficient

that they defy appellate review. See Tekkno Labs., Inc. v. Perales, 933 F.2d 1093, 1097 (2d Cir. 1991). However, Rule 52(a) also explicitly provides that a trial court may read into the record its findings of fact and conclusions of law. That is what was done here, and although the court's decision was brief, we are not uncertain of the basis for its decision. Hence, a remand for more detailed findings is not necessary.

CONCLUSION

Consequently, we affirm the judgment of the district court insofar as it dismissed plaintiff's retaliatory termination from employment claim, and we affirm the dismissal of the due process cause of action insofar as it related to the alleged deprivation of a property interest. We reverse the judgment insofar as it dismissed plaintiff's due process claim alleging a deprivation of a liberty interest, and we remand for the district court to order a name-clearing hearing and for further proceedings not inconsistent with this opinion.

ALTIMARI, Circuit Judge, concurring in part and dissenting in part. I vote to affirm the judgment of the district court in full.

I concur in the majority's decision, except with respect to Donato's alleged liberty interest. I firmly believe that this Court has gone too far. The due process clause of the Fourteenth Amendment was not intended to protect probationary employees against negative job evaluations. Accordingly, I must dissent with the majority's decision to the extent that the liberty interest determination can be read broadly to grant a due process right to all those public employees who are dismissed with negative job evaluations.

The majority suggests that the outcome regarding Donato's alleged liberty interest is dictated by Huntley v. Community Sch. Bd., 543 F.2d 979 (2d Cir. 1976). I cannot agree. The Court in Huntley stated that a liberty interest arises when a public employee is faced with such an overwhelmingly negative job evaluation as to go to "the very heart of [that employee's] professional competence." Id. at 985. As the Court

concluded in Huntley, "it [was] abundantly clear that Huntley's chances of obtaining a supervisory position in the public school system [had] been drastically impaired." Id. While Donato's job evaluation was by no means laudatory, her future supervisory employment was not foreclosed to the same degree as was Huntley's.

Unlike the broad-based condemnation of Huntley's performance, Donato's evaluation was of a different character. Huntley's job failures were broadly stated and encompassed the whole range of professional tasks associated with any supervisory position in the public school system. Donato's alleged failures, on the other hand, can in large part be summarized by the final stated reason for her termination -- "[i]neffective commitment to the Middle School." (emphasis added). As such, while Donato's evaluation is unlikely to assist her in acquiring a future supervisory position, much of Donato's reputed job failure concerned her professional inefficacy at the middle school level and is unlikely to foreclose the possibility of a supervisory position at some other level. Compare O'Neill v. City of Auburn, 23 F.3d 685, 691 (2d Cir. 1994) (defendant had been described by employer generally as "incompetent"); Huntley, 543 F.2d at 985 (Board's publicly announced charges of incompetence went "to the very heart of Huntley's professional competence" and "drastically impaired" his chances of receiving another supervisory position "in the public schools or elsewhere.") (emphasis added).

Finally, I firmly believe that, if read expansively, the majority's discussion of Donato's liberty interest will place school districts in a difficult position. When faced with a probationary employee who performs below expectations, school districts will be reluctant to state all of that employee's shortcomings, for fear of triggering a liberty interest. While such an observation clearly should not dictate the outcome of our constitutional analysis, it is illustrative of why the majority has set the threshold too low for those "stigmatizing allegations" that implicate the fourteenth amendment. A probationary employee's negative job evaluation must clearly

foreclose any and all employment in that employee's chosen field before a liberty right comes into play. No such interest is implicated here.

APPENDIX B

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

LINDA DONATO,

Plaintiff,

-against-

PLAINVIEW-OLD BETHPAGE CENTRAL SCHOOL DISTRICT and EDWARD METZENDORF,

Defendants.

93 CIV 1378 (LDW)

ORDER

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The above-entitled matter came on for hearing before this Court on July 21, 1994, on the motion of plaintiff for summary judgment on the second cause of action set forth in the amended complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure with Joseph P. Marro, Esq. appearing as counsel for plaintiff, and Gregory J. Guercio, Esq. appearing as counsel for defendant. The Court having heard the arguments of counsel and having considered the briefs submitted by counsel, the evidence presented in support of and opposition to the motion, and all the files, records and proceedings in this action, and good cause appearing,

IT IS ORDERED that the motion of plaintiff for summary judgment on the second cause of action in the amended complaint be, and it hereby is, denied; and

IT IS FURTHER ORDERED that, on motion of the Court, the second cause of action set forth in plaintiff's amended complaint be, and it hereby is, dismissed.

Dated: August 10, 1994
Hauppauge, New York

/s/ Leonard D. Wexler
LEONARD D. WEXLER
United States District Judge

APPENDIX C

United States District Court
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT
E.D.N.Y.
HAUPPAUGE OFFICE

AUG 7 1995

ENTERED
8/7/95 JB

LINDA DONATO,

v.

PLAINVIEW-OLD BETHPAGE CENTRAL SCHOOL DISTRICT, ETAL

JUDGMENT IN A CIVIL CASE

CASE NUMBER: CV 93-1378 (LDW)

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That plaintiff Linda Donato take nothing to the defendants and the judgment is hereby entered in favor of the defendants and against the plaintiff dismissing the complaint with prejudice and cost.

August 2, 1995	ROBERT C. HEINEMANN
Date	*Clerk*

/s/ Josiah Kharjie

JOSIAH KHARJIE

(By) Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th day of November one thousand nine hundred and ninety-six.

UNITED STATES
COURT OF APPEALS
FILED
NOV 20 1996
GEORGE LANGE III, CLERK
SECOND CIRCUIT

Donato

Plaintiff-Appellant,

v

Dkt No: 95-7862

Plainview-Old Bethpa

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Plainview-Old Bethpage Central School District and Edward Metzendorf.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador

Beth J. Meador,

Administrative Attorney

Gregory J. Guerico, Esq.
Guerico & Guerico
980 Old Country Rd.
Plainview, NY 11803

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Each motion must be accompanied by a supporting affidavit (Local Rule 27(a)).

LINDA DONATO,

Plaintiff-Appellant,

– against –

PLAINVIEW-OLD BETHPAGE CENTRAL SCHOOL DISTRICT, EDWARD METZENDORF,

Defendants-Appellees

Use short title

95-7862

Docket Number

NOTICE OF MOTION

state type of motion

for Stay of the Mandate pending Petition for Writ of Certiorari

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

FILED

NOV 26 1996

GEORGE LANGE III, CLERK

MOTION BY: *(Name, address and tel. no. of law firm and of the attorney in charge of case)*

GUERCIO & GUERCIO
980 Old Country Road
Plainview, New York 11803
516-938-8040
ATT: Gregory J. Guercio

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

JOSEPH P. MARRO
475 Park Avenue South
New York, New York 10016
212-213-6200

Has consent of opposing counsel:

A. Been sought? ☒ Yes ☐ No

B. Been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)

Requested return date:
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? ☐ Yes ☒ No

B. by firm date of argument notice? ☐ Yes ☒ No

C. If Yes, enter date:_____

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☒ No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☒ No

If No, explain why not: This is a motion to stay the mandate pending petition to the U.S. Supreme Court for a writ of certiorari

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☒ No

Judge or agency whose order is being appealed:

Decision of the Second Circuit, dated September 24, 1996, copy included in moving papers as separate exhibit

Brief statement of the relief requested:

The relief requested is a stay of issuance of the Mandate, pending filing of a Petition for a Writ of Certiorari to the United States Supreme Court.

Complete Page 2 of this Form

By: *(Signature of attorney)*

/s/ GJG

Signed name must be printed beneath

Gregory J. Guercio

Appearing for: *(Name of party)*

Plainview-Old Bethpage Central School District, Edward Metzendorf

Appellant or Petitioner: ☐ Plaintiff ☒ Defendant

Appellee or Respondent: ☐ Plaintiff ☐ Defendant

Date

November 26, 1996

Kindly leave this space blank

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is granted Issuance of the Mandate is stayed for 60 days or until a Petition is filed

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

FILED

DEC -5 1996

GEORGE LANGE III, CLERK

/s/ Richard J. Cardamone

/s/ Frank R. Altimari

12/5/96
Date

/s/ Fred J. Parker
Circuit Judge

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

----------x

LINDA DONATO,

Plaintiff-Appellant,

– against –

PLAINVIEW-OLD BETHPAGE CENTRAL SCHOOL DISTRICT, and EDWARD METZENDORF,

Defendants-Appellees.

AFFIDAVIT IN SUPPORT OF MOTION TO STAY THE MANDATE PENDING PETITION FOR WRIT OF CERTIORARI

Docket No. 95-7862

----------x

STATE OF NEW YORK)
COUNTY OF NASSAU) ss.:

HENRY L. GRISHMAN, being duly sworn, deposes and says the following:

1. I am the former Superintendent of Schools for the Plainview-Old Bethpage Central School District (the "DISTRICT"). I held that position from July 1, 1992 until November 1, 1995. I have held the position of Superintendent in various districts for the last nineteen years.

2. This Affidavit is submitted in support of the DISTRICT's petition to stay the mandate in this action.

3. When my employment with the DISTRICT commenced, during the summer of 1992, I met with Dr. Alan Groveman, the Assistant Superintendent for Instruction and we reviewed the current administrative staff so as to make an assessment of each administrator's strengths and weaknesses. Our review revealed that the Director of Pupil Personnel Services and two Assistant Principals in the District, one male and one female, all exhibited certain weaknesses that needed to be addressed in the

coming year. LINDA DONATO ("DONATO") was one of the Assistant Principals who exhibited certain weaknesses in her job performance.

4. At that time, I had not yet reviewed any records relating to DONATO and had no knowledge of her history with the DISTRICT or her prior lawsuit.

5. Throughout the Fall of 1992 and Winter of 1992, Dr. Groveman kept me apprised of the progress of the administrative staff, including DONATO. With respect to DONATO, Dr. Groveman advised me that DONATO was not demonstrating significant improvement in the areas of specific concern. Because DONATO did not improve her performance in the areas of concern cited for nearly two years, I came to the conclusion that it was necessary for the DISTRICT to terminate her services as the grade 7-8 Assistant Principal at Plainview-Old Bethpage Middle School.

6. On or about April 10, 1993, I advised DONATO, in writing, I would recommend to the Board of Education that her services as Assistant Principal within the District be terminated. That letter did not contain any detailed reasons for the termination. In response to that letter, DONATO requested, and was provided with, a statement of reasons that served as the basis for my intended recommendation. My letter to DONATO set forth what I believed to be a concise list of the exact reasons for my recommendation, based solely upon DONATO's performance as a probationary assistant principal at Plainview-Old Bethpage Middle School. The contents of that letter, and the letter itself, were not published nor distributed to anyone other than DONATO, with a copy being placed in her personnel file, with DONATO's full knowledge that she had the opportunity to respond to that letter and to place any information refuting that letter in her personnel file.

7. I furnished DONATO with a statement of the reasons for my recommendation in direct response to DONATO's request.

8. At the Board meeting of May 17, 1993, I recommended to the Board of Education that DONATO's probationary

employment be discontinued. Thereafter, the Board considered my recommendation and voted to terminate DONATO's employment as a probationary assistant principal. At several meetings prior thereto, in executive session, the Board had discussed DONATO's job performance.

9. It is my understanding that the DISTRICT has an obligation to evaluate all probationary employees, with an aim toward making an intelligent and responsible recommendation regarding a grant of tenure. In this regard, the DISTRICT would be remiss in its obligation if it failed to appropriately evaluate a probationary employee's performance.

10. It is not the practice of the DISTRICT to release or reveal the contents of an employee's personnel file to any prospective employer. Each request for information from a prospective employer is treated on a case-by-case basis and appropriate recommendations are written by the DISTRICT. During the duration of my employment as Superintendent of the DISTRICT, no demands were made by any prospective employers for the release of DONATO's personnel file, and the contents of that file were not revealed to any prospective employers.

/s/ Henry L. Grishman
HENRY L. GRISHMAN

Sworn to before me this
26th day of November, 1996.

/s/ Suzanne Player
NOTARY PUBLIC

SUZANNE PLAYER
Attorney at Law
NOTARY PUBLIC, STATE OF NEW YORK
No. 02PL5030340 Qualified in Nassau County
Commission Expires July 11, 1998